

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL JR., JUDGE

DIVISION III

CA07-618

30 January 2008 EDDIE J.

NICHOLS,

APPELLANT

v.

ARKANSAS STATE HIGHWAY &
TRANSPORTATION DEPARTMENT
PUBLIC EMPLOYEE CLAIMS,
SECOND INJURY FUND & DEATH &
PERMANENT TOTAL DISABILITY
FUND,

APPELLEES

AN APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[F412492]

AFFIRMED

Eddie Nichols began working for the Arkansas State Highway and Transportation Department in June 2004 when he was 74 years old. His job duties included cutting grass with a weed eater, mowing grass with a bush hog and a tractor, picking up trash from drainage ditches, and filling potholes with asphalt. After working for the Department for about four months, Nichols suffered a compensable back injury when a pick-up truck in which he was a passenger ran off the road and almost rolled over. Nichols was thrown around inside the truck. The Department paid temporary total disability benefits through 20 October 2005 and accepted a 12% permanent impairment rating. Nichols sought additional benefits.

After a hearing, the administrative law judge determined that Nichols's healing period

ended on 20 October 2005, that he was not entitled to temporary total disability benefits from 21 October 2005 through 27 February 2006, that he was not entitled to a 15% permanent impairment rating, and that he was not entitled to any wage-loss disability or permanent-and-total disability benefits. The Workers' Compensation Commission affirmed and adopted the ALJ's findings. Nichols appeals.

I.

Nichols first argues that substantial evidence does not support the Commission's finding that he was not entitled to temporary total disability benefits beyond October 20th. To receive temporary total disability benefits, Nichols had to prove by a preponderance of the evidence that he was within a healing period and was totally incapacitated from earning wages. *Searcy Industrial Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 69, 211 S.W.3d 11, 13 (2005). Nichols's healing period ended when he was as far restored as the permanent nature of his injury would permit, and if the underlying condition causing his disability had become stable and nothing in the way of treatment would improve that condition. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 228, 79 S.W.3d 414, 417–18 (2002).

At his 20 October 2005 visit, Nichols's doctor noted that parts of Nichols's condition appeared "stable," determined that he had reached maximum medical improvement, assigned him a 12% permanent impairment rating, and, at Nichols's request, referred him for two more weeks of physical therapy. The doctor also completed a work-release form, which stated that Nichols had been physically unable to report to work from 27 December 2004

through 20 October 2005. This form indicated that Nichols was able to work as a flagger, pick up litter, or perform repetitive-motion duties, as long as he refrained from lifting over ten pounds. The doctor did not fill in the blank on the form for the date that Nichols was capable of returning to work. Nichols took the doctor's release to work on November 10th. According to his supervisor, Nichols was offered a job within his restrictions but did not report for work. Nichols testified, however, that based on what he knew about flagging traffic and picking up litter, he could not have done those jobs.

Nichols went to see his doctor again in late January 2006. The doctor took x-rays and noted that, "I reviewed the x-rays of the cervical spine. They appear stable as compared to the x-rays obtained in September of last year. The implants have not changed in position. There is no evidence of subluxation." At that visit, his doctor also took him off work for six weeks.

The ALJ found that Nichols failed to prove that he remained within his healing period and totally unable to earn wages between 21 October 2005 and 27 February 2006. We agree. The fact that Nichols underwent physical therapy after October 20th is not dispositive because, in some circumstances, a claimant may choose, or be entitled to, ongoing medical treatment after the end of a healing period. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 236, 184 S.W.3d 31, 35 (2004). And though Nichols's doctor took him off work again in January 2006, he gave no explanation for this action, and noted Nichols's "severe degenerative disc disease" at that visit.

Nichols also argues in passing that his supervisor should not have been allowed to testify about the doctor's release that Nichols brought to her in November 2005 because she did not prepare it, the Department did not mention in its discovery responses that she had knowledge about it, and it is inconsistent with other medical reports. The Commission has much latitude in evidentiary matters, and we see no abuse of the Commission's broad discretion in admitting the supervisor's testimony about the doctor's release. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 69, 61 S.W.3d 856, 860 (2001).

Because on October 20th Nichols's doctor indicated that Nichols's condition had stabilized, that he was at maximum medical improvement, and that he was no longer physically unable to report to work, substantial evidence supports the Commission's denial of temporary total disability benefits after 20 October 2005. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 265, 209 S.W.3d 445, 448 (2005).

II.

Nichols next argues that the Commission erred in finding that he was entitled to the 12% permanent impairment rating that had already been accepted by the Department, rather than a 15% rating. Permanent impairment is the permanent functional or anatomical loss remaining after Nichols's healing period ended. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 33, 115 S.W.3d 823, 827 (2003). The Commission has adopted the *AMA Guides* to be used in the assessment of anatomical impairment. Ark. Code Ann. § 11-9-522(g)(1)(A) (Repl. 2002); *Excelsior Hotel*, 83 Ark. App. at 33, 115 S.W.3d at 828.

The medical records show that in October 2005, Nichols's doctor assigned him a 12% rating, but in September 2005, January 2006, and February 2006, that same doctor indicated that Nichols's rating was 15%. The October 2005 record is the only time that the doctor specifically stated that he was basing his rating on "AMA criteria." In her opinion, which the Commission adopted, the ALJ found that:

A review of the *Guides to the Evaluation of Permanent Impairment*, 4th Ed., indicates that the 12% permanent impairment rating is the more appropriate rating. Table 75 of the *AMA Guides* is more closely aligned with Dr. Shahim's 12% permanent impairment rating. . . . I find the 12% permanent impairment rating that the respondents have accepted is the appropriate rating.

The Commission must consider all the medical evidence. *Patchell*, 86 Ark. App. at 235, 184 S.W.3d at 34 (2004). And it is charged with deciding which portions of that evidence to credit and translate into a finding of permanent impairment using the *AMA Guides*. *Excelsior Hotel*, 83 Ark. App. at 33, 115 S.W.3d at 828. The Commission may even assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Ibid*. Based on our review of the medical evidence and Table 75 of the *AMA Guides*, we hold that substantial evidence supports the Commission's decision about a 12% permanent impairment.

III.

Nichols also argues that the Commission erred in determining that he was not entitled to any wage-loss disability or permanent-and-total disability benefits. If, however, Nichols received a bona fide and reasonably obtainable job offer at wages equal to or greater than his average weekly wage at the time of his accident, then he was not entitled to permanent partial

disability benefits in excess of his permanent physical impairment benefits. Ark. Code Ann. § 11-9-522(b)(2).

After receiving Nichols's medical-work release in November 2005, the area maintenance supervisor testified that she called Nichols at home and offered him a job within his work restrictions. She testified that Nichols agreed to report for work the following day but did not show up. A few weeks later, the Department sent Nichols a letter again offering him a job within his work restrictions. Nichols, however, failed to contact the Department by the deadline given in the letter.

Nichols points out that another physician evaluated him in February 2006 and assessed greater work restrictions than those assessed in October 2005. But our law is clear that the Commission has the duty of weighing the medical evidence and, if that evidence conflicts, resolving the conflict is a task for the Commission, not our court. *Geo Specialty Chemical, Inc. v. Clingan*, 69 Ark. App. 369, 372, 13 S.W.3d 218, 219 (2000). Substantial evidence supports the Commission's finding that Nichols neither accepted the bona fide job offer nor attempted to see if he was capable of performing the job. Therefore, he was not entitled to any wage-loss disability or permanent-and- total disability benefits.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

